Supreme Court, U.S.
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No. 98-651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

KRIS LINDQUIST,

Petitioner

vs.

STEVEN LOBECK and ANDREW WORONKA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

As detailed below, there is no cause for this Court to review the Florida District Court of Appeal's decision in *Lindquist v. Woronka*, 706 So. 2d 358 (Fla. 4th DCA 1998), because that decision accurately analyzes the law of substantive due process and applied that law to the unique facts of the case. Moreover, there is no cause for review because this claim is not yet ripe. The Florida District Court of Appeal acknowledged that the counts against the City of Rivera Beach are still pending in the lower court. *Lindquist,* 706 So. 2d at 358 n.1. Respondents also represent to this Court that Petitioner's claims against the City arising out of the same incident are still pending in the lower court.

A. The facts of the incident in this case.

The lower court found that:

> . . . [P]laintiff was arrested by defendants while they were on duty with the City of Riviera Beach Police Department. At the time of his arrest, plaintiff was intoxicated, disoriented, confused, unware of his surroundings, and otherwise incapacitated.

Lindquist, 706 So. 2d at 358.

> Plaintiff was initially arrested in the area of Blue Heron Blvd., a multiple-lane highway, and then transported two miles to the City of Riviera Beach Police Department, which is also located on Blue Heron Blvd.

Lindquist, 706 So. 2d at 358.

> Then, pursuant to department policy, plaintiff was charged with disorderly conduct [footnote omitted], and then released with a notice to appear at a future court date. After his release, while crossing the highway near the police station on foot, plaintiff was struck by a vehicle.

Lindquist, 706 So. 2d at 358. Finally, the lower court reasoned that:

> Although Plaintiff alleges that defendants placed him in a more dangerous position by his arrest and release, the release of plaintiff at the Riviera Beach police station which happens to be located near an intersection, is insufficient, under the cases on which plaintiff relies, to impose civil rights liability on defendants.

Lindquist, 706 So. 2d at 360.

REASONS FOR DENYING THE WRIT

Petitioner argues that there exists a "compelling reason" warranting review of the state court decision in *Lindquist v. Woronka*, 706 So. 2d 358 (Fla. 4th DCA 1998), because the Florida District Court of Appeal has "decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." (Pet., p. 5.) Specifically, Petitioner argues that *Lindquist, supra*, directly conflicts with the holdings in *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998); *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997) and *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996), and that this Court should therefore issue the Writ of Certiorari.

Respondents, on the other hand, first argue that this case is not ripe for review because Petitioner has not yet suffered an adverse consequence resulting from the lower court's opinion. Further, there is no conflict among the circuits and the Florida Appeals Court. The unique and differing facts of the cases presented by Petitioner do not conflict with the Florida Court of Appeals. In addition to the lack of a conflict, there is no evidence of inconsistent approaches taken by lower courts in determining when the failure of a state or governmental entity to provide an individual with adequate protective services constitutes a violation of substantive due process. *See DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 194, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989), and its progeny. Indeed, this Court decided *DeShaney* because the particular substantive due process issue, at that time, was of "importance to the issue of the administration of state and local governments." *DeShaney*, 489 U.S. at 194. *DeShaney* effectively set the parameters of substantive due process rights for persons detained and released by law enforcement officials.

A.

THE RIPENESS DOCTRINE PRECLUDES REVIEW BY THIS COURT.

After a careful review of the limited record in this case, this Court should determine that, because of both jurisdictional and prudential concerns, the present case or controversy is not ripe for judicial review. Article III of the United States Constitution limits the jurisdiction of federal courts to cases and controversies of sufficient concreteness to evidence a ripeness for review. *See* U.S. Const. art. III, § 2, cl. 1. "Even when the constitutional minimum has been met, however, prudential considerations may still counsel judicial restraint." *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931,

940 n.12 (D.C. Cir. 1986). The ripeness doctrine is designed to protect federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes. "The doctrine seeks to avoid entangling courts in the hazards of premature adjudication." *Abbott Lab. v. Gardner*, 387 U.S. 136, 148, 87 S. Ct. 1507, 1515, 18 L. Ed. 2d 681 (1967).

The ripeness inquiry requires a determination of: (1) the fitness of the issues for judicial decision; and (2) the hardship to the parties of withholding court consideration. *Abbott*, 387 U.S. at 149, 87 S. Ct. at 1515-16; *see also Cheffer v. Reno*, 55 F.3d 1517, 1524 (11th Cir. 1995). Courts must resolve

> whether there is sufficient injury to meet Article III's requirement of a case or controversy and, if so, whether the claim is sufficiently mature, and the issues sufficiently defined and concrete, to permit effective decision-making by the court.

Cheffer, 55 F.3d at 1524.

First, the issues in this case are not sufficiently defined and concrete because the record is not well developed. Specifically, Petitioner alleges that the Florida District Court of Appeals decision conflicts with three federal circuit court opinions: *Davis, supra*; *Stemler, supra* and *Kneipp, supra.* Each of those decisions was rendered after a record was developed for purposes of summary judgment. The record in the instant case is merely based on allegations in a complaint, without the guidance of a full factual record. For example, Petitioner's claim is based on the type of substantive due process this Court recognized in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 200, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). In that case, this Court had the benefit of a record on

summary judgment. Subsequent cases construing the contours of the type of substantive due process recognized in *DeShaney, supra*, were also decided on summary judgment records. *See, e.g., County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1717, 140 L. Ed. 2d 1043 (1998).

Second, there is not a sufficient injury justifying review of the claim. The limited issue on appeal — whether the Florida District Court of Appeal's interpretation of the facts of this case constitutes a claim for substantiative due process as against police officers in their individual capacity — is not dispositive of the case.[1] Petitioner's constitutional and state tort claims against the municipality are still pending in the trial court. This Court has recognized that even when jurisdiction exists it should not be exercised unless the case "tenders the underlying constitutional issues in clean-cut and concrete form." *Rescue Army v. Municipal Court*, 331 U.S. 549, 584, 67 S. Ct. 1409, 1427, 91 L. Ed. 1666 (1947). Problems of prematurity and abstractness may well present "insuperable obstacles" to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present. *Id.* at 574, 67 S. Ct. at 1422. Thus, a court is only obligated to rule upon those properly presented questions that are necessary for decision of the case. *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 n.2, 92 S. Ct. 1716, 32 L. Ed. 2d 317 (1972) (when the issues are not presented with the clarity needed for effective adjudication, appellate review inappropriate). Because of the procedural stance of this case, Petitioner does not face the immediate prospect of sustaining some direct injury as a result of the Florida Court of Appeal's opinion because Petitioner's alternate claims (against

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1. Even if Petitioner has stated a substantive due process claim against the individual police officers, certainly this right was not so clearly established as to deprive those officers, sued in their individual capacities, of the protection afforded by qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

the government agency) are still pending in the trial court. *See, e.g., Cole v. Richardson*, 405 U.S. 676, 92 S. Ct. 1332, 31 L. Ed. 2d 593 (1972).

B.

THE DECISION OF THE FLORIDA DISTRICT COURT OF APPEALS DOES NOT CONFLICT WITH *DESHANEY* AND ITS PROGENY.

The record before this Court is not suitable for considering the broad question of whether this Court should expand the concept of substantive due process. First, this Court must focus on the allegations in the complaint to determine whether Petitioner's description of the purported constitutional right at stake and what the individually-sued police officers of the City of Riviera Beach did to allegedly deprive Petitioner of that right "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." *Collins v. Harker Heights*, 503 U.S. 115, 128, 112 S. Ct. 1061, 1070, 117 L. Ed. 2d 261 (1992). This Court is being asked to conduct a reading of the complaint that would be contrary to the lower court's review. Ultimately, Petitioner argues that this Court should expand the notion of substantive due process so that the facts as alleged in the complaint fit within its narrow contours.

This Court has "always been reluctant to expand the concept of substantive due process. *Collins, supra*, at 125, 112 S. Ct. at 1068; *Regents v. Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26, 106 S. Ct. 507, 513-14, 88 L. Ed. 2d 523 (1985). This Court is disinclined to expand the concept of substantive due process because:

> guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. The

> doctrine of judicial restraint requires us to exercise at utmost care when we are asked to break new ground in this field.

Harker Heights, 503 U.S. at 125, 112 S. Ct. at 1068. In particular, the Due Process Clause does "not transform every tort committed by a state actor into a constitutional violation." *DeShaney*, *supra* at 202. Rather, only in

> ***certain limited circumstances*** the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals . . . because the person is unable "by reason of the deprivation of his liberty to care for himself." . . .

DeShaney, *supra* at 199 (emphasis added). Because the "certain limited circumstances" mandate is clear and was not misinterpreted by the Florida Court of Appeals, the petition should be denied.

Indeed, this Court should not expand the contours of substantive due process. Petitioner argues that it is impossible to reconcile the Florida Court of Appeal's opinion with *Davis*; *Stemler* and *Kneipp*, *supra*, unless this Court ignores the facts as alleged in the complaint. (Pet., p. 17). However, this Court can reconcile the Florida Court of Appeals decision by recognizing the challenges posed by the narrow contours of substantive due process:

> If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. ***As a general matter, then, we conclude that a State's***

> ***failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.***

DeShaney, 489 U.S. at 196-197 (emphasis added). In this case, Officers Woronka and Lobeck allegedly detained and arrested Petitioner and then released him from custody. Petitioner was then was struck by an automobile driven by another individual, a tortfeasor. It is this individual, the tortfeasor driver of the private vehicle, whose "violence" caused injuries to the Petitioner. It is this type of private activity that simply does not fit within the narrow contours of substantive due process.

As the *DeShaney* Court noted,

> [i]t may well be that, by voluntarily undertaking to protect Joshua [the victim] against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger.

DeShaney, 489 U.S. at 201-202.

> The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf . . . In the substantive due process analysis, ***it is the State's affirmative act of restraining the individual's freedom to act on his own behalf — through incarceration***, institutionalization, or other similar restraint of personal liberty — which is the "deprivation of liberty" triggering the protections of the Due Process Clause, ***not its failure to act to***

> ***protect his liberty interests against harms inflicted by other means.***

DeShaney, 489 U.S. at 199-200 (emphasis added). As shown below, the Petition should be denied because the police officers in this case, unlike other cases relied upon by Petitioner, had no duty to protect Petitioner against "harms inflicted by other means" such as third party motorists.

1. The facts alleged in the complaint do not establish a deprivation of substantive due process within the contours already well-established by this Court.

Petitioner heavily relies upon dicta in *DeShaney* to expand the concept of substantive due process. Yet, even if this Court were to grant the petition, it should be reluctant to expand the notion of substantive due process given the limited, narrow facts in the record. For example, there is no allegation that the initial deprivation of Petitioner's liberty caused Petitioner not to care for himself. The facts do not show that during Petitioner's detention anything was done to him to make him more intoxicated or disoriented. Nor do the facts show that Plaintiff was placed in a situation more dangerous than he had already been in. Indeed, the complaint does not even indicate any particulars about where Petitioner was located at the time of his arrest, so as to determine if similar dangers existed prior to, and after, Petitioner's arrest. Thus, the record severely limits this Court's determination of whether the narrow exception of *DeShaney* applies.

> It should not be surprising that the constitutional concept of conscience-shocking duplicates no traditional category of common-law fault, but rather points clear away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability.

County of Sacramento v. Lewis, 118 S. Ct. 1708, 1717, 140 L. Ed. 2d 1043 (1998). This Court has therefore rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct. Rather, it has recognized that "behavior on the other end of the culpability spectrum" most probably supports a substantive due process claim. *Lewis, supra* at 1718. The record in this case does not even remotely establish behavior at that other end of the culpability spectrum. Further, this Court recently reasoned that culpability falling within the middle range, following from something more than negligence but "less than intentional conduct" is a "matter for closer calls." *Lewis, supra*, at 1718 (no substantive due process violation where case fails to meet the shocks-the-conscience test). Even if the record in this case were sufficient to establish a "close-call", prudence should lead this Court to deny a petition based on a close-call and a limited record.

2. The Petition misrepresents the factual disparities of the alleged conflicting appellate decisions.

In furtherance of his assertion that there is a conflict between the circuit court of appeals and the Florida Appeals Court, Petitioner has distorted the facts of the three cases upon which he relies to justify review by this Court. A review of the facts of the circuit court of appeals decisions illustrates the grave dissimilarities in facts and thus ignores the importance of how each circuit court of appeal was able to determine that the alleged facts of those cases met the "shocks-the-conscience" test. Finally, each of the circuit court of appeals cases are procedurally different because they were reviewed in the scope of summary judgment proceedings where a factual record was established, rather than mere allegations in a complaint.

POINT I: *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998)

Davis was decided after a record was established for purposes of a summary judgment proceeding. *Davis, supra*, at 1023. According to the published opinion, Davis consumed a substantial amount of alcohol, later attempted to enter a local mission, was refused admission because of his inebriated condition, became violent, and then broke some windows in the mission. The police were called and later arrested Davis for intoxication and disorderly conduct. Because the local jail was full, Davis was ordered released if he "was not so drunk that he would be a hazard to himself." *Davis, supra*, at 1023. Disregarding the order, officers handcuffed Davis, placed him in a patrol car, drove him to area outside of the city limits, and released Davis at the entrance to a beach on a road with a 55-mile-per-hour speed limit, few street lights, and no sidewalk. It was also alleged and disputed by the defendants that the officers told Davis that they were dropping him off outside the town limits to "teach him a lesson." *Id.* Davis headed back into town and asked a town resident to call the police. A police officer arrived at the scene, allegedly refused to give Davis a ride back into town, and a few minutes later Davis was hit by a car. The officer alleged that Davis rejected his assistance, calling him "just another damn white officer." The Sixth Circuit relied upon party stipulations and a summary judgment record to make its factual determination that a jury might find a substantial due process violation.

In the instant case, there is no allegation that Petitioner was taken out of the city limits, was placed at an area near a beach or on a 55 mile-per-hour road that was dimly lit and had no sidewalks. Nor is there an allegation that Petitioner, after leaving the police station, asked for a ride back to town, but was refused. Petitioner has distorted the facts of *Davis* in his petition by omitting the fact that it was alleged that the police

officers disregarded an order to release Davis only if he was not a hazard to himself, that Davis was released near an entrance to a beach, and that the officers told Davis they were going to "teach him a lesson." (Pet., pp. 6-7). While *Davis* may be a close-call, the instant case is not because the alleged facts are insufficient (and dissimilar to *Davis*) to determine if the narrow *DeShaney* exception applies.

POINT II: *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997)

Stemler was decided after a record was established for purposes of a summary judgment proceeding. According to the opinion, Stemler was involved in a fight with her boyfriend that had resulted in her being struck in the back of her head with a blunt object. Stemler and her inebriated girlfriend, Black, then entered a car and sped away from the scene, being chased by Black's boyfriend, who had previously slammed her against a wall. The chase ensued, but stopped temporarily in the driveway of a retired police officer for the City of Florence. He called 911 after the high-speed chase began again on the nearby residential streets. Later a Florence police officer intervened by pulling his police cruiser in front of the vehicles. At that time, Stemler ran to the police officer and explained how the intoxicated boyfriend was chasing her at a high speed. However, people at the scene accused Stemler of being a lesbian. The Florence police officer later submitted a police report claiming that he did not smell alcohol of the boyfriend's breath, contrary to statements he made to others at the scene. In addition, a blood test taken later of the boyfriend revealed a level above the legal limit. Other officers at the scene reiterated to the Florence police officer and others at the scene that Stemler was a lesbian. Thereafter, the Florence police officer suspected Stemler of being intoxicated. He arrested Stemler, but not the inebriated boyfriend. Other persons at the scene, including

police officers, tried to convince the Florence police officer that Stemler was not intoxicated and that he should arrest the boyfriend instead. Nevertheless, the boyfriend drove away from the scene and had an accident a few minutes later on a major highway. The accident resulted in the death of Black. The boyfriend was finally arrested for driving under the influence. The plaintiffs, the estate of Black and Stemler, alleged a substantive due process claim under 42 U.S.C. § 1983. The Sixth Circuit held that the defendant police officers knew or should have known that the boyfriend had assaulted Black earlier in the evening and that they chose to affirmatively place her in harm's way by allowing her to leave the scene with the boyfriend:

> The very notion that police officers should not have known that they could not force an incapacitated woman to drive off with an obviously drunk man who they had reason to believe had beaten her betrays a chilling and unacceptable vision of the role of the police in our society. In short, these facts support a substantive due process claim . . .

Stemler, supra, at 870. Clearly *Stemler* is a case at the "other end of the culpability spectrum" and thus meets the "shocks-the-conscience" test. This Court denied the petition for writ of certiorari in the case. *See City of Florence v. Chipman,* 118 S. Ct. 1796, 140 L. Ed. 2d 936 (1998).

In the instant case, there is no allegation that Petitioner was allowed to ride in a vehicle with an obviously intoxicated person who had previously assaulted him. Nor is there any allegation that police officers turned a blind eye to eyewitness statements and were motivated by possible prejudice based on the sexual orientation of a key witness. Moreover, the record in this case presents absolutely no evidence that the Riviera

Beach police officers affirmatively placed Petitioner in harm's way after an on-scene investigation that would have revealed that their actions in allowing the Petitioner to leave the scene would have been reasonably calculated to lead to an injury.

Petitioner has grossly distorted the facts of *Stemler* in his petition by simply illustrating the facts of the case as follows: "the police encountered a drunken individual, briefly held the individual in custody, and released the individual into a dangerous situation." (Pet., p. 9). While the facts of *Stemler* may also be a close-call (like *Davis*), the instant case is not because the alleged facts are insufficient (and dissimilar to *Stemler*) to determine if the narrow *DeShaney* exception applies.

POINT III: *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996)

Again, *Kneipp* was decided after a record was established for purposes of a summary judgment proceeding. According to the opinion, Kneipp and her husband were walking home after a night of drinking at a tavern on a January night in Philadelphia. The evidence showed that Kneipp's husband considered her visibly intoxicated because she staggered, smelled of urine, and was often unable to walk without assistance. Therefore, her husband had to carry her a portion of the way back to the apartment. *Kneipp, supra*, at 1201. A police officer later stopped Kneipp and her husband for causing a disturbance on the highway shortly after midnight. They were three blocks from their apartment. Kneipp leaned on the officer's car because she could not stand by herself. Other officers arrived at the scene. Kneipp's husband asked to leave the scene because he had to return home to relieve the babysitter. After he left the scene without Kneipp, the officers sent Kneipp home alone. Later, Kneipp's husband went back to look for Kneipp when she did not return home. When he saw the police officer parked nearby, he asked about what happened to Kneipp. The officer threatened

to arrest him, so he did not inquire further. Later, Kneipp was found at the bottom of an embankment next to a plaza near her home. She suffered from hypothermia and severe brain injury.

The Third Circuit reasoned that the police officers "used their authority to make [Kneipp] more vulnerable to danger had they not intervened." *Kneipp, supra*, at 1209. The Third Circuit focused on the cold weather and how that made Kneipp more vulnerable to harm. Moreover, the court opined that but for the intervention of the police, it was reasonable to conclude the Kneipp would have made it home safely with her husband. The court distinguished the facts of the case from the policy that "plaintiffs do not have a constitutional right to be protected by the police against harm inflicted by third persons." *Kneipp, supra*, at 1210.

In the instant case, there is no allegation that Petitioner was thwarted from any particular journey to return home. Petitioner was not so drunk that he could not walk home. Nor was Petitioner separated from a companion and thus left in a worse position that when the police first encountered him. Nor is there any allegation in this case that predictable weather conditions would have sufficiently warned police officers of a dangerous situation. Rather, the record is devoid of facts to determine if the case fits within the "guideposts for responsible decisionmaking" recognized in *DeShaney*. *See Harker Heights*, 503 U.S. at 125, 112 S. Ct. at 1068. All that the record establishes is that Petitioner, after being arrested for disorderly conduct and being intoxicated, was released by police officers on or near the same road he was arrested at, and thereafter a third party ran into Petitioner.

Again, Petitioner has distorted the facts of *Kneipp* in his petition by failing to include essential facts for a substantive due process analysis. For example, Petitioner did not include

the fact that Kneipp's husband asked the police officer about his wife's whereabouts after the initial encounter, nor did he mention the threat made to the husband by the police officer, or the extreme cold weather of that January night. (Pet., pp. 11-12). While the facts of *Kneipp* may also be a close-call (like *Davis* and *Stemler*), the instant case is not a close-call. Thus, there is no conflict among the Florida Court of Appeals decision and the three appellate decisions discussed in the Petition.

CONCLUSION

For the reasons given above, the petition should be denied because the case is not ripe for review and/or because there is no clear error in the lower court's application of the law of substantive due process. The facts of the cases relied upon by Petitioner are extremely dissimilar from the facts of the instant case. The facts of the instant case do not rise to the level of a recognized substantive due process violation.

Respectfully submitted,

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